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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE PERFORMING RIGHT SOCIETY LIMITED AND SOCIETE DES AUTEURS, COMPOSITEURS ET EDITEURS DE MUSIQUE AS *AMICI CURIAE*

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The Performing Right Society Limited ("PRS") and Societe des Auteurs, Compositeurs et Editeurs de Musique ("SACEM") submit this brief as *amici curiae* in support of the petitions for certiorari to review the judgment entered by the Court of Appeals for the Second Circuit on August 8, 1977.

INTEREST OF *AMICI CURIAE*

PRS is an association of composers, authors and publishers of musical works which was established in the United Kingdom in 1914 to administer on behalf of its members certain of the rights provided by copyright legislation. It is a non-profit organization whose membership exceeds nine thousand British composers and publishers. It also represents composers and publishers in twenty-six other countries, formerly part of the British Commonwealth, that have no indigenous performing right organizations.[1] PRS is affiliated on a reciprocal basis with performing right organizations in thirty-seven countries, including the United States, that have a similar interest in this case.

SACEM, established in 1851, is the world's oldest performing right organization. It has approximately 40,000 members and, like its British counterpart, represents composers and publishers in twenty-four other countries, formerly part of the French Empire, that have no indigenous performing right organizations. It is affiliated on a reciprocal basis with performing right organizations in over thirty nations, including the United States.

[1] These countries are: Barbados, Bermuda, British Virgin Islands, Cayman Island, Cyprus, Gibraltar, Guyana, Hong Kong, Republic of Ireland, Jamaica, Kenya, Leeward Islands, Malawi, Malaysia, Malta, Mauritius, Nigeria, Pakistan, Seychelles, Singapore, Sri Lanka, Tanzania, Trinidad, Uganda, Windward Islands, and Zambia. Jamaican music, in particular, is widely played in the United States.

In this country PRS and SACEM grant non-dramatic performance rights to mutually exclusive portions of their repertoires of musical works to ASCAP and BMI. By means of the type of blanket license challenged by CBS in this lawsuit, the repertoires of both *amici* have been made available to all the television networks and their vast audiences, as well as to countless television and radio stations, hotels, restaurants, concert halls, and a myriad of other users who perform music publicly. In this way, for over half a century, the music of the foreign composers and publishers who are members of, or represented by, PRS and SACEM has been performed in the United States.

Continued access to the American market, with full opportunity for performances on the television networks, is of vital importance to PRS, SACEM, and their members. For the year 1976, PRS received payments from ASCAP and BMI for performances of musical works in PRS' repertoire of about $3.4 million and $2.7 million, respectively, or a total of about $6.1 million.[2] In that year, SACEM received a total of approximately $1.4 million from ASCAP and BMI.[3] Payments from ASCAP and BMI accounted for more than thirteen percent of PRS' 1976 gross revenues, and a smaller, but still significant, percentage of SACEM's 1976 gross revenues. A substantial portion of PRS' and SACEM's receipts from ASCAP and BMI represents royalties earned by the performance of their repertoires on the television networks under blanket licenses.

PRS and SACEM are thus directly affected by the Second Circuit's holding that the blanket licenses between

[2] Reciprocally, PRS distributed a total of about $4.5 million to ASCAP and BMI, amounts due for the performance in the United Kingdom of works in their respective repertoires.

[3] In the same year, SACEM distributed a total of approximately $2.9 million to ASCAP and BMI for performances of their works in France.

ASCAP and BMI and the television networks are price-fixing agreements illegal *per se* under the Sherman Act.[4] That decision, unless reversed by this Court, will unjustifiably restrict the opportunities of the members of PRS and SACEM to have their works performed, on a fair, non-discriminatory and competitive basis, in this country. The Second Circuit seems to have given no consideration to the effect of its decision upon composers and publishers outside the United States. Yet its ruling threatens the world-wide system of international licensing of musical performing rights—a system that has existed for many decades with the sanction of the Department of Justice and the federal courts, and has functioned efficiently in promoting the progress of musical arts here and abroad.

REASONS FOR GRANTING THE WRIT

I.

The affiliation arrangements among PRS, SACEM, ASCAP and BMI are part of the structure of affiliation agreements among performing right organizations in nearly forty countries throughout the world. The agreements between PRS and ASCAP and BMI are typical. Under these agreements PRS grants to ASCAP and BMI the right to license mutually exclusive portions of its repertoire of musical works for performances in the United States. ASCAP and BMI represent PRS' members and insure protection of their copyright rights in the United States. The ASCAP and BMI repertoires are thus expanded to include PRS' repertoire, including British music and musical works by composers in the

[4] The court also appears to have found ASCAP and BMI guilty of copyright misuse "for essentially the same reasons. . . ." *Columbia Broadcasting System, Inc.* v. *American Society of Composers, Authors and Publishers*, 562 F.2d 130, 141 n.29 (2d Cir. 1977), *rev'g*, 400 F.Supp. 737 (S.D.N.Y. 1975).

former British Commonwealth countries listed in note 1 *supra*. Comparable agreements with SACEM similarly enlarge the ASCAP and BMI repertoires to include the works of French composers and others represented by SACEM.

Under these affiliation agreements, when a performing right organization obtains the performance rights to a work in a foreign organization's repertoire, it distributes royalties for performances according to its normal rules and procedures, just as if the work were in its own repertoire. The repertoire of each performing right organization is thus available on a fair and non-discriminatory basis to the other organizations for licensing of performances in their own countries. This structure, which has been in place since the early part of this century, provides a simple, efficient, and equitable method by which foreign composers and publishers may have their music recognized and performed in the United States. The result is a vast enrichment of the inventory of musical works performed in this country. Reciprocally, it provides a fair and workable means whereby American composers and publishers compete for recognition in the United Kingdom, France and throughout the world.

The present system is the product of many years' experience in meeting the special needs and problems of international licensing of musical performance rights. Its economic and cultural benefits are immense. Economically, it establishes a world-wide market in which musical compositions freely and effectively compete, unfettered by national boundaries. Culturally, this "common market" fosters an unobstructed flow, back and forth, of musical creativity throughout the world. For example, British composers and artists, including Ralph Vaughan Williams, Benjamin Britten, the Beatles, the Rolling Stones, and Elton John (all PRS members), have contributed much to the musical scene in the United

States. SACEM's members, such as Michel Legrand, Olivier Messiaen, Dimitri Tiomkin, Jacques Brel and Edith Piaf, have also made significant contributions.

The decision of the Court of Appeals casts a cloud of illegality on this international structure that has been shown by experience to work effectively and fairly for all concerned—the public, the users, and the individual members of the performing right organizations. The decision below would go far toward turning the clock back to the days before performing right organizations came into being to give composers and publishers a practical mechanism for both licensing the performance rights to their musical works and ending piratical performances. Under the rule of *per se* illegality announced by the court below, it is difficult to conceive of any alternative structure—not involving the use of blanket licenses—that could succeed as well in facilitating the international exchange of performance rights.

The concern of the *amici* is neither hypothetical nor undue. The decision below has already brought serious uncertainty to the international system of licensing music. As of March 31, 1978, CBS unilaterally terminated its interim license with ASCAP, a *pendente lite* arrangement that received explicit judicial approval at the time CBS brought this suit eight years ago.[5] CBS is now performing ASCAP's repertoire of musical works, including those of PRS' and SACEM's members, without paying any royalties whatsoever. Relying on the decision below, it is simply appropriating, without regard to copyright, the music of British, French and other foreign

[5] Under this arrangement, approved by the District Court and incorporated into an order in *United States* v. *ASCAP*, Civil Action No. 13-95 (S.D.N.Y., filed August 10, 1970), CBS has paid $4,320,000 per year for an interim blanket license from ASCAP, subject to retroactive readjustment depending on the outcome of the suit. CBS made payments thereunder from the date of the order until its unilateral termination became effective on March 31, 1978.

composers represented by PRS and SACEM whose works have been licensed to ASCAP. CBS' action, we fear, is likely to be only the first evidence of the disruptive impact that the decision below will have upon the international licensing of musical performance rights.

It is not possible to detail all the adverse implications of the Second Circuit's decision for the international exchange of musical performance rights or to foresee all the harm it will do to performing right organizations and their members throughout the world. Most importantly, unless the decision is reversed by this Court, ASCAP and BMI may, as a practical matter, be unable to offer blanket licenses to the television networks—or, indeed, any form of license which, in the court's view, "tampers with" price competition among individual members. 562 F.2d at 136. Nor does it appear that PRS or SACEM would be able to do so directly. Indeed, the opinion below seems to condemn, as illegal *per se*, *any* system of licensing in which individual copyright holders employ a common selling agency which charges a "single price." The Court of Appeals states flatly that whenever "any group of sellers or licensors continues to sell their products through a single agency with a single price, competition on price by the individual sellers has been restrained." *Id.* at 136. The extreme sweep of this simplistic view of the *per se* price-fixing rule surely calls for review by this Court.

Other potential consequences of the decision below are also of deep concern to PRS, SACEM and their members. Insofar as the decision contemplates a regime of direct licensing by individual composers and publishers, the members of PRS and SACEM would be placed at a substantial competitive disadvantage *vis-a-vis* American composers and publishers. Direct licensing would require direct contact between the television networks and individual copyright holders or their representatives. A substantial quantity of PRS' and SACEM's music performed

in the United States in recent years consists of works whose copyright holder is not represented in this country (except by ASCAP or BMI). In such cases the practical burdens of transoceanic negotiation—involving time-zone differentials and difficulties in identifying and communicating with particular copyright holders[6]—would almost certainly curtail the use of foreign music by the networks.[7]

While it is possible for foreign copyright holders to obtain representation in the United States, and many PRS and SACEM members already do have agents (called "sub-publishers") in this country, such representation is very costly. An individual copyright holder would have to give up to his sub-publisher between twenty-five and fifty percent of the royalties payable as a result of an American performance. Even those foreign copyright holders who have existing arrangements with American sub-publishers would probably be required to pay more to compensate the sub-publishers for the additional burdens of direct negotiation with the networks.[8] At a minimum, therefore, the Second Circuit's decision would greatly increase the costs to foreign com-

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[6] These practical difficulties would be multiplied many times over for members of SACEM and the large number of other performing right organizations in non-English speaking countries.

[7] An example is the 30 or so TV series or films currently being exhibited or broadcast in the American market that contain musical scores composed by PRS members who do not have representation in this country. The networks have been authorized to perform these scores under their blanket licenses with ASCAP or BMI. In light of the court's decision, any future use of these series and films may require transatlantic negotiations with the individual British composers.

[8] There is also a potential problem of conflict of interest if a single sub-publisher represents several copyright holders whose music may be interchangeable from the networks' standpoint.

posers and publishers of making their music available to the United States market.

To the extent that per use licensing through ASCAP and BMI is compelled by the decision below—a "remedy" logically inconsistent with the court's holding that use by individual composers and publishers of a "single agency with a single price" (562 F.2d at 136) is illegal *per se*—the transactional costs would likewise vastly increase, assuming such a regime is feasible at all. It is difficult to understand how "ASCAP itself" could "provide some form of per use licensing which will ensure competition among the individual members . . . ." (*Id.* at 140.) Would it simply compile and maintain a fee schedule from which the networks would shop? If so, how would such a list (covering millions of works that may be televised in a variety of differing circumstances) be compiled, and how would it be administered if the network, for example, wanted a musical work only at a below-list price or if either of two works was acceptable depending on the relative prices? If there is no fee schedule, what would ASCAP's role be in situations where the network desires music of a kind for which numerous individual compositions may be suitable? Patently, a system of per use licensing would at best be grossly inefficient and at worst totally unworkable. In any case, the inevitable result would be to restrict the flow of musical works from foreign composers and publishers into the American market. PRS and SACEM do not believe that the antitrust laws of the United States—and, more particularly, the judge-made rule declaring agreements on prices by competitors to be illegal *per se*—were intended to have that effect.

II.

Application of the *per se* price-fixing rule to blanket licenses, upon which the present system for international exchange of musical performance rights has long been

based, is an unwarranted extension, and indeed a misuse, of that rule.

Under the decision below, *per se* illegality is automatically established by the use of "a single agency with a single price," thereby "restrain[ing]" competition by individual sellers and "tamper[ing] with price structures." 562 F.2d at 136. The decision equates blanket licensing with price-fixing agreements *simpliciter*. Even assuming, however, that the use of blanket licenses "restrains" price competition among individual sellers, it does not follow that this long-standing practice in a unique industry—which was developed for reasons unrelated to price and has undeniable benefits—necessarily is, or should be, subsumed within the rule of *per se* illegality attaching to price-fixing agreements. The threshold question here is whether the validity of this practice is to be judged by the *per se* rule or the rule of reason. This critical question is begged in the decision below. The Second Circuit assumed, without support in the record in this or any other case, that ASCAP and BMI are as much engaged in price-fixing as the defendants in cases like *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927). But an agreement having an effect on prices is not *ipso facto* a price-fixing agreement. Any agreement that restrains competition, whether reasonably or unreasonably, "tampers with" or affects prices in some manner. That does not make it illegal *per se*.

As a prerequisite to classifying any business practice as illegal *per se*, this Court has insisted upon a clear showing, based upon experience and economic realities, that its adverse competitive effects so outweigh any possible benefits that it should be outlawed in every case, without inquiry into the particular circumstances. Only last Term, the Court made "clear that departure from the rule-of-reason standard must be based on demonstrable

economic effect rather than . . . upon formalistic line drawing." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977). Similarly, in *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963), the Court declined to invoke a *per se* rule because "[w]e do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. . . . We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' [citing *Northern Pacific Railway* v. *United States*, 356 U.S. 1, 5 (1958)] and therefore should be classified as *per se* violations of the Sherman Act." *See National Society of Professional Engineers* v. *United States*, —— U.S. ——, 46 U.S.L.W. 4356, 4359 (U.S. Apr. 25, 1978) ("agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality . . . are 'illegal per se;' . . . agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed" must be measured under a rule-of-reason analysis).

Here, there is certainly not enough knowledge as to the "demonstrable economic effect" of blanket licensing of musical compositions "to be certain" that a *per se* rule should be applied. Indeed, the Court of Appeals acknowledged that "[t]here is not enough evidence in the present record to compel a finding that the blanket license does not serve a market need . . . ." 562 F.2d at 140.

Moreover, as Mr. Justice Black stated for the Court in *Northern Pacific*, a practice may not be classified as a *per se* violation unless it is shown to "lack . . . any redeeming virtue." 356 U.S. at 5. In this case, no such claim is or could be made. As the District Court's opinion explains, the blanket license originated in the dual

need of composers and publishers, on the one hand, for protection against piracy of their copyrighted works, and of users, on the other hand, for a "clearinghouse" to obtain performance rights to large numbers of musical compositions. 400 F.Supp. at 741-43. Even the Second Circuit does not regard blanket licensing as "a 'naked restraint' ineluctably doomed to extinction," nor does it deny that a blanket license may "serve a market need for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable." 562 F.2d at 140.

Thus, to the extent that blanket licensing of musical compositions has been the subject of inquiry in this and other cases, the conclusion that emerges is precisely opposite to that of the Court of Appeals: the demonstrable competitive and other economic benefits of blanket licensing, if anything, outweigh any possible effect on "price competition" between individual copyright holders and, at a minimum, preclude its classification as a *per se* violation.

The inappropriateness of *per se* treatment is confirmed by the recent decision in *National Society of Professional Engineers* v. *United States*, *supra*. The agreement there, which expressly prohibited the submission of competing prices to customers, obviously "tampered with" and had an effect on prices. Under the Second Circuit's analysis, that should have led to application of a *per se* rule. But this Court chose instead a rule-of-reason approach under which it struck down the engineers' agreement as having "[o]n its face" an "anticompetitive purpose and effect," 46 U.S.L.W. at 4359. In contrast, the agreements in this case have no comparable purpose and, because they contain no prohibition against price competition, no comparable effect. Indeed, the Second Circuit assumed only that blanket licensing "dulls [the individual copyright owner's] incentive to compete," and that assumption was

contrary to the decision of the District Court specifically upholding blanket licensing after elaborate inquiry into its competitive impact.[9]

CONCLUSION

The petitions for certiorari should be granted.

Respectfully submitted,

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[9] The District Court applied a rule-of-reason standard. 400 F. Supp. at 747; *see Columbia Broadcasting System, Inc.* v. *ASCAP*, 337 F. Supp. 394, 398 (S.D.N.Y. 1972).